Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

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| In the Matter of | ) | |
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| Review of the Commission's | ) | MM Docket No. 94-150 |
| Regulations Governing Attribution | ) | |
| of Broadcast and Cable/MDS Interests | ) | |
| | ) | |
| Review of the Commission's | ) | MM Docket No. 92-51 |
| Regulations and Policies | ) | |
| Affecting Investment | ) | |
| in the Broadcast Industry | ) | |
| | ) | |
| Reexamination of the Commission's | ) | MM Docket No. 87-154 |
| Cross-Interest Policy | ) | |
| | ) | |
| Review of the Commission's | ) | MM Docket No. 91-221 |
| Regulations Governing | ) | |
| Television Broadcasting | ) | |
| | ) | |
| Review of Policy and Rules | ) | MM Docket No. 87-7 |
| Television Satellite Stations | ) | |



To: The Commission

## COMMENTS OF DIVERSIFIED COMMUNICATIONS

Diversified Communications ("Diversified"), by its attorneys and pursuant to Section 1.415(a) of the Commission's rules, 47 C.F.R. § 415(a), hereby comments on the above-referenced proceedings. As detailed below, Diversified: (i) opposes the Commission's proposals to make attributable same-market television station local marketing agreements ("LMA") and broadcast joint sales agreements ("JSA"); (ii) asks the Commission to grandfather existing same-market LMAs and JSAs through the entirety of the agreements in the event that it deems these agreements attributable; and (iii) urges the Commission to provide waivers for UHF stations to be able to utilize same-market LMAs and JSAs.

## BACKGROUND

Diversified is the licensee of WCJB-TV, Gainesville, Florida, WABI-TV, Bangor, Maine, and WPDE-TV, Florence, South Carolina, and also has experience on both sides of time brokerage agreements.[1/] Thus, it is well versed in the operation of small market television stations, both UHF and VHF outlets. Diversified's operations are and have been in all VHF, all UHF, and VHF-UHF markets, experience which adds value to its comments herein.

### Attribution Further Notice

In its *Further Notice of Proposed Rule Making*, MM Docket Nos. 94-150, 92,51, 87-154, FCC 96-436 ("*Attribution Further Notice*"), the Commission requests comment on, *inter alia*, (i) whether a television local marketing agreement ("LMA") should be treated at an attributable interest to the same degree as a radio LMA; and (ii) whether a Joint Sales Agreement ("JSA") should be considered an attributable interest.

Treatment of Television LMAs. Under the Commission's rules, a radio station licensee who brokers more than 15 percent of the weekly broadcast hours of another station in the same market has an attributable interest in the brokered radio station. *See* 47 C.F.R. § 73.3555(a). In the *Attribution Further Notice*, the Commission tentatively concludes to treat television LMAs the same as radio LMAs. Thus, if the proposed rule is adopted, the Commission would prohibit the ownership of one television station and an LMA arrangement to program another television station in the same market, unless, of course, an applicable exception to the rule were provided. *Attribution Further*

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1/ Diversified also held television station licenses in New Bern, North Carolina and Scranton, Pennsylvania.

*Notice*, at ¶ 27. The brokered television station would also count against the brokering television station for purposes of the national ownership caps and the one-to-a-market ownership limits. *Id.*

Treatment of Joint Sales Agreements. Under current Commission policy, separately owned broadcast stations "can function cooperatively in terms of advertising sales and other aspects 'so long as each licensee retains control of its station and complies with the Communications Act, the Commission's rules and policies and the antitrust laws.'" *Attribution Further Notice*, at note 57 (citing *Report and Order, Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2787 (1992), *reconsidered on other grounds*, 9 FCC Rcd 7183 (1994)). The Commission now asks whether JSAs in the same market should be treated as attributable interests to the same extent as radio station LMAs. *Id.* at ¶ 33. Thus, if the Commission were to consider JSAs in the same market attributable, the ownership of one television or radio station and an agreement for the joint sales of broadcast commercial time on another television or radio station in the same market would be prohibited. Again, however, exceptions to the rule are being considered, as discussed below.

TV Ownership Notice

In its *Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221, 87-7, FCC 96-438 (*"TV Ownership Notice"*), the Commission requests, *inter alia*, (i) whether the television duopoly rule should be modified from the Grade B contour to the DMA/Grade A contour; (ii) whether exceptions to any television duopoly restriction should be permitted for common ownership of two UHF stations or a VHF-UHF combination in the same market; and (iii) if the Commission decides that television LMAs are attributable interests, how it should grandfather existing LMAs.

Proposed DMA/Grade A Duopoly Rule. Currently, Section 73.3555(b) prohibits the common ownership of two television stations whose Grade B signal contours overlap.[2/] The Commission now tentatively concludes to permit the common ownership of television stations in different DMAs so long as there is no Grade A contour overlap.[3/] *TV Ownership Notice*, at ¶ 13.

The UHF Exception. The Commission invites parties to comment on whether there should be exceptions to the proposed DMA/Grade A duopoly rule and asks parties advocating exceptions to provide specific evidence of the projected economic benefits that would flow from any such relaxation. *TV Ownership Notice*, at ¶¶ 29 - 31. Noting the historic distinction between UHF and VHF stations, the Commission asks whether it should treat the common ownership of UHF stations in the same DMA or in the same city more favorably than the common ownership of non-UHF stations. *Id.* at ¶ 33. The Commission also questions the wisdom of making any exception a firm rule or something to be decided on a case-by-case waiver basis and what specific factors should be considered in deciding waivers. *Id.* at ¶ 34.

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2/ A Grade B contour encompasses approximately a 50 to 70 mile radius around the television station's transmitter. *See TV Ownership Notice*, at note 23.

3/ A Grade A contour encompasses approximately a 40 to 50 mile radius around the television station's transmitter. *See TV Ownership Notice*, at note 23.

## DISCUSSION

### A. Television LMAs Should Not Be Attributable

Diversified opposes the Commission's proposal to make attributable same-market television LMAs. The Commission has failed to present evidence in this proceeding that television station licensees or brokers are abusing television LMAs in that competition or programming diversity are being adversely affected by the use of LMAs.[4/] Absent such evidence, the Commission has no reason, other than speculation of abuse and other adversities, to regulate television LMAs.[5/] Mere speculation of abuse is a grossly inadequate reason for imposing strict regulation of agreements that have been unregulated for decades.

Although Diversified has no exact figures on the prevalence of LMAs in the television broadcast industry, figures requested by the Commission, Diversified has experience with LMAs. Those agreements have been entered into in good faith and with the knowledge that the agreements were in compliance with Commission regulations and policies. Furthermore, LMAs often are "tied in" with other contracts, such as lease agreements and asset purchase options. In other words, the

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4/ To the contrary, there is evidence that the use of LMAs has helped increase competition and programming diversity. For example, it is not uncommon for a television station licensee to help a party wanting to add another television station to a small market or construct a television station in a market that previously had no stations pursuant to an LMA, coupled with lease and asset purchase option agreements. Thus, television LMAs have apparently increased -- not decreased -- competition and diversity by making viable operations that would be marginal, at best, as stand-alone facilities.

5/ In the event the Commission has concerns that a broker is using a television LMA to adversely impact competition or diversity, the Commission has the authority to inspect the LMA. *See First Reconsideration Order*, 7 FCC Rcd 6387 (1992). Furthermore, the United States Department of Justice (the "DOJ") has recently become quite active in alleged radio advertising antitrust cases. There is no reason to believe that the DOJ would limit its inquiries into just radio advertising if it believed that television advertising concentration raises antitrust issues.

LMAs do not stand alone, but are often just one piece of a larger contractual arrangement between the licensees and brokers, all of which arrangements will be impacted if LMAs are deemed attributable

The FCC should not now disrupt good-faith business arrangements involving LMAs where there is no real evidence of abuse and make same-market LMAs attributable. Such a move would force many licensees and brokers to unwind the LMAs, and it would also negatively impact countless complex contractual arrangements. Simply put, the end (attempting to thwart undocumented and possibly nonexistent anti-competitive and anti-diversity concerns) does not justify the means (making attributable same-market television LMAs, thus forcing the dismantling of the LMAs and related contractual arrangements).

B. Joint Sales Agreements Should Not Be Attributable

Diversified also opposes the Commission's proposal to make attributable same-market JSAs. Here again, the Commission has failed to present evidence that licensees or brokers are abusing JSAs in that competition or programming diversity are being adversely affected by the use of JSAs.[6/]

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6/ The Commission does, however, raise the possibility of diversity and competition concerns with respect to JSAs. *See Attribution Further Notice*, at note 58. It is unclear what concerns were raised in the first case it cited, Letter of Roy J. Stewart, Chief, Mass Media Bureau, to Jason L. Shrinksy, Esq., *et al.* (May 2, 1995). In the second cited case, Letter of Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau, to Nathaniel F. Emmons, Esq. (June 8, 1995), an issue was raised about whether a JSA should be a factor in deciding whether certain "business arrangements" between two Colorado radio station licensees raised multiple ownership concerns regarding the purchase of two stations, including whether there had been a *de facto* transfer of control of the station licenses. The JSA element, however, was no doubt a minor concern given the other factors that were at issue, including: (i) the buyer was owned and controlled by a former employee of the seller; and (ii) a subsidiary of the seller was financing the buyer's purchase of the stations, and had the option to acquire controlling stock of the buyer. It should be noted that, despite the concerns raised, the assignment of the station licenses was granted.

Without such evidence, the Commission should not regulate JSAs. Again, the mere speculation of abuse is an inadequate reason for regulating agreements that have been unregulated and found acceptable by the Commission even before LMAs became fashionable. Further, given the lack of evidence that licensees or brokers are abusing JSAs with regards to competition or programming diversity, Diversified believes that JSAs should not be attributable under any circumstances, even if the parties have other relationships which relate to debt or equity of the station in question.

The Commission itself has acknowledged that separately owned broadcast stations "can function cooperatively in terms of advertising sales and other aspects 'so long as each licensee retains control of its stations and complies with the Communications Act, the Commission's rules and policies and the antitrust laws.'" *Attribution Further Notice*, at note 57 (citing *Report and Order, Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2787 (1992), *reconsidered on other grounds*, 9 FCC Rcd 7183 (1994)). The Commission has not presented evidence demonstrating that licensees are losing ultimate control over their stations through JSAs. Changing Commission policy now by strictly regulating JSAs is especially unwarranted in the era of Congressional deregulation and increasing competition from other video operators, and absent evidence that licensees are controlling other licensees' stations through the use of JSAs.

### C. If Same-Market LMAs and JSAs Are Deemed Attributable, Exceptions to the Rule Should Be Made

#### 1. Existing Television LMAs Should Be Grandfathered Through Entirety of Agreements

In the event that the Commission concludes that same-market television LMAs are attributable, exceptions to the rule must be adopted. In its *TV Ownership Notice*, the Commission

proposes that LMAs entered into before November 5, 1996 should be grandfathered.[7] *TV Ownership Notice*, at ¶ 89. The Commission also suggests allowing a grandfathered television LMA to be transferable. *Id.* However, the Commission proposes limiting the grandfathering provisions to the initial term of the LMA, thus eliminating previously bargained-for options to extend or renew the initial term of the agreement.[8]

Diversified agrees that, in the event that the Commission deems same-market television LMAs attributable, the agreements should be grandfathered and transferrable. However, limiting the grandfathering provision to the initial term of the agreement is unjustified. Television licensees bargained in good faith for agreements that usually contain options to extend or renew, and the Commission should not arbitrarily disregard these vital extension or renewal provisions.[9] Such action is unjustified given the extraordinarily negative impact it would have on these agreements. Again, television LMAs are often intermingled with other agreements, such as leases and options, making the LMA just one piece of a complex contractual arrangement.

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7/ November 5, 1996 is the adoption date of the *TV Ownership Notice*.

8/ Although the Commission cites a lack of knowledge about the specific provisions of television LMAs, in fact, they are modeled on similar radio agreements with which the Commission is familiar.

9/ It makes no sense, for example, for the Commission to grandfather an LMA with an initial term of twelve years but limit a two-year LMA that has five two-year renewal options to its initial two-year term. The new attribution rule would, in effect, punish the licensee who chose to essentially retain tighter control over its station by strictly limiting the terms of the LMA, while rewarding the licensee who arguably retained less control by opting for a long-term LMA.

2. The Commission Should Provide Exceptions for UHF Combinations

The Commission should relax the television duopoly rule to permit common ownership of UHF stations in the same market. And, this relief would be even more warranted in the event the Commission concludes that same-market television LMAs and broadcast JSAs are attributable.[10/]

The basis for providing a UHF exception is that UHF stations remain at a significant competitive disadvantage as compared to VHF stations. In its *TV Ownership Notice*, the Commission noted several economic disadvantages faced by UHF stations raised by various parties, including: (1) UHF stations are not assured of must-carry status on cable systems because typically weak UHF signals permit cable systems to claim that the cable community is not in the station's market; (2) UHF stations are not as attractive as VHF stations to networks; and (3) UHF stations incur additional expenses to compete with VHF stations on signal quality.

As noted, Diversified operates UHF and VHF stations. It has operated facilities in all UHF, all VHF, and UHF-VHF markets. Diversified confirms that based on its experience, the UHF disadvantage remains, although it is difficult to quantify since it is imparted by a myriad of factors. Diversified also points to the ever increasing competition that television broadcasters face, including competition from DBS, cable, video providers, and other new market entrants. On balance, Diversified supports a rule, not a case-by-case waiver standard, that would permit the common ownership of two UHF stations in the same market and would sanction UHF-VHF combinations as

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10/ It should be noted that the National Association of Broadcasters' Television Board of Directors recently voted to recommend "substantial relaxations of FCC station ownership restrictions," including to permit the common ownership of two UHF stations and UHF-VHF combinations in the same market. Communications Daily, Vol. 17, No. 19, page 6 (January 29, 1997). The endorsement of the relaxed standards is expected to be included in the NAB's Comments in this proceeding. *Id.*

well. For business planning and other reasons, a fixed rule, rather than an uncertain waiver policy, is required.

## CONCLUSION

WHEREFORE, the premises considered, Diversified opposes the Commission's proposals to make attributable same-market television station LMAs and broadcast JSAs, asks the Commission to grandfather existing same-market LMAs and JSAs through the entirety of the agreements in the event that it deems these agreements attributable, and urges the Commission to provide waivers for UHF stations to be able to utilize same-market LMAs and JSAs.

Respectfully requested,

DIVERSIFIED COMMUNICATIONS

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